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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 188

WILLIAM HENDERSON (Partnership), *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Henderson, a partnership engaged in business in Louisiana respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the aforesaid cause. That Court's opinion was rendered on February 14, 1946, and a petition for rehearing was denied on March 15, 1946.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1935 (U.S.C.A., Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906(g) printed in the Appendix hereto.

SUMMARY STATEMENT OF MATTERS INVOLVED.

William Henderson, a partnership, herein for convenience called Henderson, was a refiner of raw sugar, and during the period from June 8, 1934, through October 31, 1935, paid processing taxes totaling $1,138,421.82 under the Agricultural Adjustment Act of 1933 as amended. It filed claim for refund of these taxes pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue disallowed this claim in full. Thereupon, Henderson filed its petition for a hearing on the merits with the United States Processing Tax Board of Review. That Board heard the cause but shortly thereafter and before decision the cause was transferred to the Tax Court of the United States on December 31, 1942, as provided by statute (56 Stat. 957, 967).

The Tax Court made extensive findings of fact from the record prepared before the Processing Tax Board of Review, but rested its decision that your petitioner had shifted the tax in the sale price on the single fact that the petitioner, along with the entire sugar industry, adopted a policy of passing the tax on by an increase in the sale price of sugar and there was an absence of evidence that it ever changed that policy, either in practice or principle. That decision was rendered on August 24, 1943 (R. 34).

Eighteen months later this Court in another sugar case, *Webre Steib Co. Ltd.* (324 U. S. 164, 174), held that the very same price increase was not conclusive of a tax shift, indicating for the Tax Court's guidance on remand that it should consider how far the petitioner had succeeded in its

effort to pass the tax on, and that the price may not have responded continuously to the effort to shift the tax. As a further guide of the type of evidence that will determine a tax shift this Court cited *Johnson, AAA Refunds: A Study in Tax Incidence* (1937) (37 Col. L. Rev. 910) (R. 175-187). The said cited authority holds that in considering a tax shift all the economic factors that affect price must be considered and weighed. The pertinent part of that article appears in the record (R. 175-187).

After this Court spoke in *Webre Steib Co. Ltd.* (supra) the Tax Court had occasion to meet the same fact in another Louisiana sugar case, *South Coast Corporation* v. *Com.* (T.C. Memo. Docket No. 2165, decided June 11, 1945), and, in deciding for the taxpayer referred to the same price increase and stated:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

In the case at bar the Tax Court had evidence of the type pronounced in the *Johnson* article and made findings, inter alia, of the factors that influenced the price your petitioner received for sugar to wit:

(a) The quota system limiting the importation of raw sugar went into effect as a part of the Jones-Costigan Act on June 8, 1934. It is stipulated that the inauguration of the quota system resulted in a direct increase in the price of raw sugar (R. 30).

(b) In only nineteen instances while the tax was in effect did the taxpayer bill its customers for the tax on sugar, syrup and molasses as a separate item. The tax so billed amounted to $1,639.19 (R. 31).

(c) There is strong competition in the sugar trade among the refiners and petitioner often has to make price concessions to meet this competition. It does so in some instances by absorbing a part or all of the freight charges

where sales are made outside of its established territory (R. 26, 27).

(d) The sale price does not always reflect the cost of production. Petitioner's output of one month may be sold at a profit and that of the succeeding month may be at a loss, depending on market fluctuations (R. 27).

(e) Petitioner undertook to keep its regular customers supplied with sugar at prices which would enable them to sell to the retail trade with a reasonable margin of profit (R. 27).

(f) A substantial portion of petitioner's sugar is sold in accordance with a trade practice known as "Contract Bookings on Market moves". Under this practice the refiner advises its customers of intended advances in the sale price of sugar and permits them to book orders for at least a thirty-day supply at the price then in effect (R. 27).

(g) The petitioner guarantees its customers against a decline in the price of sugar from the date of sale until the sugar is paid for (R. 27).

(h) There was a rapid advance in the market price of sugar in the spring of 1935, due principally to the reduction of quotas by the Secretary of Agriculture and the resulting competitive buying (R. 28).

The foregoing fact findings made by the Tax Court are pertinent to the issue. Important too, are facts that the Court failed to find, but are undisputed in the evidence:

(a) By November 23, 1934 "Prices were so chaotic each sale is a matter of trading" (R. 154).

(b) The petitioner progressively "drove" the price of refined sugar down, a total of 40 cents per cwt. in an effort to move sugar into retailer's hands before the "floor stocks tax became effective" (R. 114, 136).

(c) "The advance of June 1934 did not hold because the trade had taken a considerable amount of sugar at $4.10 and did not come into the market again. The demand was flat. There was no demand" (R. 136).

In addition, the respondent, in fact the United States Government, through its Secretary of Agriculture on March 15, 1937 in a Press Release analyzing the effect of a tax on sugar stated:

> "Thus it will be noted that the quantity of supply, and not the cost of production, is the direct causal factor in determining price; and factors other than cost of production—in this case quotas—can supersede cost of production in determining supply, and hence in determining price."

The foregoing fact findings by the Tax Court and its subsequent action in *South Coast Corp* v. *Com.* (supra) would appear to make it clear that the Tax Court decided the case at bar under a misconception of the law; and, that it would have decided it differently had this Court's decision in *Webre Steib Co. Ltd.* (supra) construing the law preceded rather than followed the decision in the instant case.

Your petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit and that Court affirmed on the same single fact deemed conclusive by the Tax Court (R. 167); holding that the decision of the Tax Court was supported not only by the margin comparisons but by other substantial evidence (R. 168).

We contend that the function of the Circuit Court was not to determine whether there was substantial evidence to support the conclusions of the Tax Court. The function of the Circuit Court was to examine the findings of fact and decide whether or not the Tax Court had reached its conclusion by weighing the facts according to the rule of law laid down by this Court. Obviously it had not. Hence from Henderson's viewpoint these are the

QUESTIONS PRESENTED.

1. Is the rule of law reestablished by this Court in *Dobson* v. *Com.* (320 U.S. 489)—whereby the function of the reviewing Court is limited to an ascertainment of whether there is a rational basis for the conclusions approved by the Tax Court and denying it the right to weigh all the evidence—applicable when this Court subsequent to the decision of the Tax Court construes the statute in a manner requiring the weighing of evidence more embracing than that weighed by the Tax Court in reaching its conclusion?

2. Where the Tax Court has decided a cause on a single finding of fact—ignoring all its other findings of fact—and then loses jurisdiction before this Court in another cause construes the applicable law in a manner requiring the weighing of the ignored findings of fact, will this Court grant certiorari to determine whether such decision is in accordance with law as this Court has subsequently construed the law?

3. Was it error for the Tax Court to rest its decision on the *adoption of a policy* of passing the tax on to its vendees by an increase in the sale price of sugar (R. 33); instead of weighing the evidence to determine how far petitioner succeeded in passing on the tax (*Webre Steib,* 324 U.S. 174; and, did the Court err in failing to take cognizance of its finding of fact that the price did not respond continuously to the effort to shift the tax? (R. 32, 33; *Webre Steib,* 324 U.S. 174).

REASONS FOR GRANTING THE WRIT.

1.

Only this Court, by granting the writ, can correct the gross miscarriage of justice that will otherwise result from the Tax Court's erroneous construction of the law prior to this Court's decision in *Webre Steib Co. Ltd.* (supra). The evidence has been adduced and the Tax Court

made findings of fact with respect thereto, but ignored all of such findings of fact in deciding the case.

Unless certiorari is granted we have the anomalous situation of your petitioner being denied justice and its competitors *Webre Steib Co. Ltd.*, *South Coast Corp.*, and *Insular Sugar Refining Co.* (141 F. (2d) 713), being granted justice—even though the same single fact applies to all—simply because the Tax Court erroneously construed the law.

2.

The Circuit Court of Appeals, by applying the rule of law, reestablished by this Court in *Dobson* v. *Com.* (supra), instead of recognizing the exception resulting from an intervening decision by this Court, has perpetuated the error of the Tax Court, and this taxpayer cannot procure justice unless this Court grants certiorari and upon remand directs the lower Court to weigh all the evidence and findings of fact.

3.

Rule 38, paragraph (5)(b) of the rules of this Court sets forth as one of the reasons this Court in its exercise of sound judicial discretion, may grant certiorari is where a Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court. We think that the Circuit Court by confining itself to the *Dobson* rule has decided the case at bar in conflict with the decision of this Court in *Webre Steib Co. Ltd.* insofar as that case decides the type of evidence to be weighed.

4.

Certiorari is being applied for in two other sugar cases, *Realty Operators, Inc.* and *Laurence M. Williams* as *Liquidator of Sterling Sugars, Inc.* All three cases were decided by the Tax Court on the same narrow fact before

this Court decided *Webre Steib*. All three cases were consolidated for argument before the Fifth Circuit. The Fifth Circuit affirmed all three cases without testing them by the rule laid down by this Court in *Webre Steib*. The granting of certiorari and subsequent remand is the only means by which a flagrant miscarriage of justice can be avoided.

5.

Counsel for your petitioner successfully represented *Webre Steib* before this Court; and represents *Realty Operators, Inc.* and *Laurence M. Williams* in the petitions they have filed this day. Counsel assures this Court that the evidence this Court believed lacking but necessary to a sound decision in *Webre Steib* is contained in the record in the instant cases in abundance; so that, if the Tax Court is given an opportunity to weigh such evidence we believe that the ends of justice will be served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

WILLIAM HENDERSON (Partnership), *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In applying for a writ of certiorari in this case and the companion cases filed this day we have a most unusual situation that only this Court can correct. The Tax Court decided these cases on the theory that the price rise in the sugar industry on the day the tax went into effect was conclusive in deciding the issue. Fortunately the Tax Court made a substantial volume of findings of fact not bearing on the grounds ultimately relied on by that Court; but, nevertheless of sufficient scope so that the record shows the taxpayer adduced substantial evidence in conformity with this Court's holding of the type of evidence necessary to correctly decide the issue. True, the taxpayer has had its

hearing on the merits, and the remand here sought is not for the purpose of retrying the case, the evidence has been adduced and the taxpayer is prepared—if need be—to rely upon the record made. The purpose of the writ is to permit the Tax Court to weigh all the evidence to the end and purpose that the test directed by this Court in *Webre Steib* (supra) may be applied.

This Court in deciding *Webre Steib* held that the price rise on June 8, 1934 was not conclusive. That the test was how far the taxpayer succeeded in its effort to pass the tax on and, that the price may not have responded continuously to the effort to shift the tax (324 U.S. 174). As indication of the type of evidence needed this Court cited *Johnson's* article in the Columbia Law Review and we have reproduced in the record from that article the entire chapter dealing with price factors (R. 175-187).

By the time this Court decided *Webre Steib* the Tax Court had lost jurisdiction of the case because an appeal had been filed with the Fifth Circuit Court of Appeals. No relief therefore was possible from the Tax Court, although that Court in a subsequent sugar case, in an opinion by the same Judge (Leech) who wrote the opinion in the *Williams* case (petition for certiorari being filed this day), attached little significance to the June 8, 1934 price rise stating:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

The Fifth Circuit Court of Appeals heard the case at bar and the companion cases filed this day in a consolidated argument, and we respectfully suggest that upon certiorari being granted one consolidated argument be held before this Court.

The Circuit Court's attention was directed to the decision of this Court in *Webre Steib* but it apparently was impressed by the argument of the Government that under the theory of *Dobson* v. *Com.* (320 U.S. 489) its function on review was limited to ascertaining whether there was sub-

stantial evidence to support the Tax Court's conclusion. This is all that the Circuit Court did, stating: (R. 166)

> "We must determine whether the evidence is legally sufficient to support the findings, but we may not weigh it."

We cannot agree that upon the rendering of a decision by this Court subsequent to a decision by the Tax Court that the Circuit Court is limited in its review. Instead we think it must test the record to determine whether the decision is in accordance with law—in accordance with the law as construed by this Court, not as the Tax Court thought it to be. Therefore, the

SPECIFICATIONS OF ERROR TO BE URGED.

are that the Circuit Court of Appeals erred:

1. In limiting its review to a determination of whether there was a substantial basis in the evidence for the conclusion reached by the Tax Court. (R. 166)

2. In failing to review the findings of fact made by the Tax Court in order to determine whether the conclusion reached from all the evidence was in harmony with the principles pronounced by this Court in a later decision.

3. By failing to find as a matter of law that the decision of the Tax Court was not in accordance with law.

4. In failing to find that the Tax Court committed reversible error in holding that the adoption of a *policy* of passing the tax on to its vendees by an increase in the sale price of sugar and the absence of evidence that it ever changed that policy, either in practice or principle, conclusively established a tax shift. (R. 33)

5. In holding that the Tax Court found that the eight factors other than the tax, adduced by the taxpayer in accounting for the spread in margins, and with respect to which the Tax Court found the basic facts (R. 28-30), did

not affect the margins as claimed by petitioner (R. 168); whereas, the Tax Court in fact held that:

> "Granting that a portion or even all of the excess of the tax period margin was attributable to one or more factors other than the tax would serve the petitioner no more than to absolve it from the unfavorable statutory presumption, or, at most, create a presumption in its favor, which the respondent would have the burden of rebutting." (R. 32, 33)

6. In failing to remand the cause to the Tax Court with instructions to determine the extent to which the said eight factors rebutted the presumption pro tanto, in accordance with the law as determined by this Court in *Webre Steib* (324 U.S. 164, 171).

ARGUMENT.

SCOPE OF REVIEW.

This Court in *Dobson* v. *Com.* (320 U.S. 489, 501) had occasion to remind the Courts that the function of a reviewing Court in tax cases coming up from the Tax Court was, under the law, limited to ascertaining whether there is found to be a rational basis for the conclusions reached by that Court, but was careful to qualify that rule of law to the extent that the decision must have warrant in the record and a reasonable basis in the law. In *Webre Steib* (supra) this Court said: (324 U.S. 173)

> "We must determine whether there is evidence which is legally sufficient for administrative action, but we may not weigh it."

and in *Com.* v. *Scottish American Inv. Co.* (323 U.S. 119, 124) this Court said:

> "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court."

We consider that good law—in any event, it is the law of the land—but we cannot lose sight of the fact that the decision of the Tax Court must be in accordance with law. Under circumstances such as those here present—that is when the Tax Court construes a law with no other guide than its own interpretation, and this Court subsequently construes the law in a manner that is clearly at variance with the construction of the Tax Court—then, it is the function of the reviewing Court to examine all the evidence and determine whether the construction of the Tax Court is according to law, as such law is construed by this Court.

That the Circuit Court did not do. The Tax Court's original interpretation is not reconcilable with the law as laid down by this Court. This is evident from the fact that the Tax Court treated the same piece of evidence differently in *South Coast Corp.* v. *Com.* (T.C. Memo. Docket No. 2165, decided June 11, 1945) after it had the benefit of a construction by this Court in *Webre Steib* (supra).

Despite the limitations placed upon the Circuit Courts, if the decision of the Tax Court is in accordance with law, no such limitation applies if the decision is not in accordance with law. Where, as here, the decision is clearly not in accordance with law as this Court has construed the law, the Circuit Court should have remanded the case for a weighing of the evidence in the light of the law as it was determined by this Court.

Since the Circuit Court did not perform its proper function, your petitioner must rely upon the grace of this Court to remedy a wrong that otherwise will be beyond correction.

THE DECISION IS NOT IN ACCORDANCE WITH LAW.

Prior to the decision of this Court in *Webre Steib* (supra) there was no guidepost for the Tax Court to follow other than its own construction of what evidence would demonstrate where the burden of the tax fell.

In *Webre Steib* this Court made it clear that the policy of the taxpayer was not controlling, nor was his belief that

he had accomplished a shift. Failure of success in the effort to shift the tax was important; likewise, the price may not have responded continuously to the effort to shift the tax (324 U.S. 174). *Johnson's* article in the Columbia Law Review (R. 138-150) was cited as the kind of evidence that would demonstrate where the burden of the tax fell.

Johnson in his article develops the full economics of what causes price changes—competition, marginal producers, elasticity of demand, etc. He begins Chapter IV (R. 175) with the statement that:

> "A tax on group production or on gross sales is shifted by the taxpayer to the extent that *the tax causes the price* of the product to be increased and the costs of production to be decreased. Since, then, tax incidence is a problem of price analysis, it can be explained only in terms of the factors which determine price." (Italics supplied)

The Secretary of Agriculture in advocating the reimposition of the tax in a Press Release dated March 15, 1937 likewise approaches the problem of tax impact by an analysis of price factors and in substantiation of his conclusions makes the following observation:

> "Perhaps it should be noted that although there was a tax of one-half cent per pound of sugar during 1935 and no tax during 1936 the difference in the price paid by consumers in the two years was only one-tenth cent."

The Secretary further finds that:

> "Thus it will be noted that the quantity of supply, and not the cost of production, is the direct causal factor in determining price; and factors other than cost of production—in this case *quotas—can supersede* cost of production in determining supply, *and hence in determining price.*" (Italics supplied)

The Tax Court found as a fact that:

> "It is stipulated that the inauguration of the quota system resulted in a direct increase in the price of raw sugar". (R. 30)

Surely, if the litigants stipulate—and the Court accepts the stipulation by adopting such stipulation as a finding of fact—that the cost of the raw product was directly increased by the imposition of the quota system, it is inconsistent for reasonable men to conclude that a corresponding increase in the price of the finished product is a passing on of the tax instead of a giving effect to the quota system that caused the increase in price of the raw product. With such findings before it, a Court has passed the stage of weighing the evidence—it has been weighed in the findings —there remains only a conclusion of law to be drawn. A conclusion of law that the increase in price was for the sole purpose of passing on the tax is not, under such circumstances, in acordance with law for the reason that it ignores a finding made to the contrary. The Tax Court changed its mind about the conclusiveness of the June 8, 1934 price rise—after this Court pointed the way—in *South Coast Corp.* v. *Com.* (supra); but, there is but one way in which the injustice in the case at bar can be corrected and that is for this Court to grant certiorari. Obviously a federal question has been decided in a way probably in conflict with an applicable decision of this court (Rule 38(5)(b)).

ACTUAL EXTENT OF THE BURDEN OF THE TAX BORNE.

The decision of the Tax Court and the Circuit Court rested on the fact that the petitioner adopted a *policy* of passing the tax on by an increase in the price of sugar on the date the tax went into effect. It ignored all other evidence in reaching its conclusion from this single fact. Subsequently this Court held that the said price rise in the sugar industry was not conclusive; that the success attained in the attempt to shift the tax and an ascertainment whether the price continuously responded to the effort to shift the tax was necessary to determine a shift. The decision of the Tax Court is therefore not in accordance with law. The price rise is the only evidence of the shift.

Eliminating that false conclusion the record discloses two lines of proof that will establish the actual extent of the burden borne.

First the findings of fact heretofore set out clearly show that the price movement was at all times controlled by factors other than the tax, and in addition the testimony of the witness Talmadge (R. 102-154) traces the entire price movement. This testimony is not only uncontradicted but in some of its most important aspects Counsel for the Respondent unqualifiedly endorsed the accuracy of Talmadge's testimony (R. 156). Under the circumstances findings of fact from such reputable testimony are in order and the Tax Court should be given an opportunity to make them, now that the theory on which the Court proceeded has been shown to be wrong. It will be noted that in *Realty Operators, Inc.* (certiorari filed this day) the Court did make similar findings—but then ignored them, due to the same wrong interpretation of the law.

The second line of proof relates to the margins. This Court held in *Webre Steib* (324 U.S. 164, 171) that the "actual extent" to which the burden of the tax was borne or shifted can be determined by a pro tanto rebuttal of the margin, and that an absorption based solely on the margins would not be irrational (324 U.S. 174). The respondent advanced no evidence other than the price rise now determined to be not conclusive.

The Tax Court ignored the margin and its rebuttal because it believed the single act of a price rise was conclusive. That conclusion being wrong the Tax Court should weigh the margin rebuttal and determine the actual extent of the burden borne or shifted.

The margin was adverse to the extent of $.00050203 per pound (R. 28). The tax was $.005 or less per pound. The total spread to be accounted for was at most $.00550203. The taxpayer adduced eight factors other than the tax with respect to which the Court found the basic facts (R. 32, 28 to 30). However, the Court failed to evaluate the effect of these eight factors on the margins due to its adoption of

an erroneous theory of the case. The finding with respect to the difference in realization and gross sales value on refined and soft sugar (R. 28) clearly is enough to change the unfavorable margin to a favorable margin. That the finding on 24,865,872 pounds of Cuban raw sugar (R. 30) affected the margins is obvious. And so with the other six items. Obviously the failure of the Tax Court to compute the rebuttal of the margin pro tanto is error. Its decision is not in accordance with law and is in conflict with an applicable decision of this Court (Rule 38(5)(b)).

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted this this petition for writ of certiorari be granted.

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APPENDIX.

Sec. 906 (g) Rev. Act of 1936 as amended (56 Stat. 969)

Section 510 (j) of Revenue Act of 1942: (56 Stat. 969)

* * * * * * * * * *

(j) Section 906 (g) (relating to appeals) is amended to read as follows:

"(g) A decision of the Board rendered after January 1, 1942, may be reviewed by a circuit court of appeals or the United States Court of Appeals for the District of Columbia, if a petition for such review is filed by either the claimant or the Commissioner within three months after the decision is rendered. Such decision may be reviewed by the circuit court of appeals for the circuit in which the claimant resides, or has his principal place of business, or, if none, by the United States Court of Appeals for the District of Columbia: *Provided, however,* that in any event such decision may be reviewed by any circuit court of appeals or the United States Court of Appeals for the District of Columbia which may be designated by the Commissioner and the claimant by stipulation in writing. Such courts shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing as justice may require. The judgments of such courts shall be final, subject to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code as amended. Such courts are authorized to adopt rules for the filing of petitions for review, preparation of the record for review, and the conduct of the proceedings on review. A decision of the Board rendered after January 1, 1943 shall become final in the same manner that decisions of the Board become final under section 1140 of the Internal Revenue Code."

Sec. 907 (e) Rev. Act of 1936 (49 Stat. 1752).

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and

after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.